Supreme Court, U.S.
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No. 97-784

In The

Supreme Court of the United States

October Term, 1997

IN RE: THEODORE B. GOULD,

Petitioner.

On Petition For A Writ Of *Mandamus*
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION OF RESPONDENT, THE BANK OF NEW YORK

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QUESTION PRESENTED

Whether the extraordinary remedy of *mandamus* is appropriate in light of the availability of, and Petitioner's reliance upon, other adequate remedies?

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STATEMENT OF JURISDICTION

The Petitioner asserts that jurisdiction exists under 28 U.S.C. § 1651(a).

No jurisdiction exists, however, as the Petitioner has failed to claim or prove the inadequacy of other remedies – specifically, some 30 prior appeals initiated by the Petitioner, in the court of appeals, followed by 14 prior petitions to this Court. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953). Further, the Petitioner has failed to demonstrate that the writ will be in aid of the Court's appellate jurisdiction, a requirement embodied in Rule 20.1.

STATEMENT OF THE CASE

Introduction

This case is the fifteenth attempt by Mr. Gould, a debtor in consolidated bankruptcy proceedings – commenced voluntarily in 1984 – to delay and disrupt the closing of the cases.[1]

The Petitioner has commenced and prosecuted, unsuccessfully in each instance, over 30 appeals to the

[1] Of the 14 prior petitions to this Court, 13 were denied. The petition in 90-1361 was consolidated with a petition for *certiorari* filed by the Solicitor General (90-1484), and was granted. The Solicitor General's petition involved complex issues regarding federal income tax and bankruptcy law. The Solicitor General prevailed; *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). After remand, the bankruptcy trustee settled the resulting tax liability with the Internal Revenue Service and the settlement was approved by the bankruptcy court.

court of appeals, and over 80 appeals in the district court, in the twelve years since a creditors' plan of reorganization was confirmed.

The present Petition is also frivolous.[2] Mr. Gould is not a lawyer and the Petition states no judicially-cognizable claim, much less a justification for *mandamus*.

The Petitioner's "Statement" is inaccurate and argumentative. The Petitioner has not properly apprised the Court of the relevant portions of the record below. In addition, the Petitioner is rearguing matters previously and finally adjudicated adversely to him.

The Petitioner was one of five debtors in consolidated bankruptcy cases commenced in 1984. In 1985, Respondent, The Bank of New York ("Bank"), filed a plan of reorganization (the "Plan") which was approved by the creditors and confirmed by the bankruptcy court. *In re Holywell Corp.*, 54 B.R. 41 (Bankr. S.D. Fla. 1985). The district court affirmed the confirmation order. *Holywell Corp. v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The court of appeals held that further appeals were moot, because the Plan had been substantially consummated and meaningful relief could not be provided; this Court denied *certiorari*. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir.), *cert. den.*, 488 U.S. 823 (1988). This Court also denied the Petitioner's

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[2] The Petitioners have been held in contempt repeatedly for attempting to relitigate previously-decided issues, and for attempts to circumvent bankruptcy court rulings. *See, e.g., In Re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

petition for *mandamus* regarding that decision by the court of appeals.[3]

The bankruptcies involved approximately 400 claims, exceeding $350 million; the Bank's mortgage claim of approximately $240 million predominated. The Plan provided that a Liquidating Trustee (a Respondent here) would liquidate the assets of the debtors to pay allowed claims, and then turn over any residual money or property to the debtors.

After a series of losses in the bankruptcy court, the Petitioner tried to circumvent the Florida bankruptcy court by filing lawsuits against the Bank and the Trustee in Virginia and in the state court in Florida.

The Virginia lawsuit culminated in a summary judgment in favor of the Bank and the Trustee; the bankruptcy court in Florida then imposed some $138,000 in sanctions against the Petitioner and his counsel.[4]

The state court lawsuit in Florida was removed by the Respondents to the Florida bankruptcy court, which promptly dismissed the lawsuit. The Petitioner appealed to the district court (which affirmed[5]) and the court of appeals (which affirmed[6]) and then sought *certiorari* (which was not granted) here; 493 U.S. 1057 (1990).

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[3] *In re Gould*, 488 U.S. 814 (1988).

[4] *In re Holywell Corp.*, 967 F.2d 568 (11th Cir. 1992).

[5] *In re Holywell Corp.*, 93 B.R. 780 (S.D. Fla. 1988).

[6] *Miami Center v. Bank of New York*, 881 F.2d 1086 (11th Cir. 1989).

The Tax Case

The prior proceedings in this Court involved the duties of the Liquidating Trustee under the Plan with respect to (a) federal income tax returns and (b) the payment of any taxes due according to such returns.

The Trustee filed an action for declaratory judgment in the bankruptcy court seeking to resolve these issues. The bankruptcy court, district court, and court of appeals concluded that the Trustee was not responsible for the filing of any such returns or the payment of any such taxes.[7]

This Court reversed, approving the position of the Solicitor General and Internal Revenue Service ("IRS") that the Trustee and Plan were subject to 26 U.S.C. § 6012(b). *Holywell Corp. v. Smith*, 503 U.S. 47 (1992). This Court did not in any way suggest that the confirmation order should be revoked or that the Plan should be rescinded.

On remand, the Trustee and the IRS settled the income tax claims for approximately $13.3 million, and the bankruptcy court approved the settlement. The settlement funds were paid. The Trustee obtained a determination that the Bank, as indemnitor and Plan proponent, was liable to the Trustee for the tax liabilities,[8] and the Trustee and Bank then settled those issues with the approval of the bankruptcy court. The district court

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[7] *In re Holywell Corp.*, 911 F.2d 1539 (11th Cir. 1990).

[8] *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993).

affirmed the approval of the settlement when the Petitioner filed his inevitable appeal.

Following this Court's 1992 opinion in the tax case, the Petitioner also filed claims in the bankruptcy court seeking damages from the Trustee and the Bank regarding the confirmation and administration of the Plan (including the income tax issues). After a trial on the merits in June, 1993, the bankruptcy court ruled in favor of the Trustee and the Bank in all respects; the district court affirmed.[9]

The Trustee's Certificate Issue

The Petitioner's unusual claim here involves the implementation of one part of the Plan. If the Liquidating Trust lacked the funds with which to pay one particular claim (and if certain other conditions occurred, which they did), the Bank was required to advance the requisite funds. In return, the Bank was to receive a "Trustee's Certificate". *In re Holywell Corp.*, 913 F.2d 873, 877 (11th Cir. 1990); 87 B.R. 712, 717 (Bankr. S.D. Fla. 1988).

The conditions occurred and the Bank advanced $22.3 million for payment of the claim, but the Petitioner then objected to the issuance of the Certificate.

The Bank filed an adversary proceeding for issuance of the Certificate, and the bankruptcy court ruled for the Bank, based on the terms of the confirmed Plan. That court also found that the debtor/Petitioner's counterclaims against the Bank and cross-claims against the

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[9] *In re Holywell Corp.*, 177 B.R. 991 (S.D. Fla. 1995).

Trustee were barred by prior, final adjudications (App. 32). The district court affirmed (App. 12, 14). The court of appeals affirmed *per curiam* as to the issuance and amount of the Trustee's Certificate, and dismissed the Petitioner's other arguments for two independent reasons: (a) the contentions were moot, because the confirmed Plan had already been substantially consummated and could not be undone (App. 9), and (b) the debtor/Petitioner did not raise such arguments or issues in his notice of appeal (App. 10-11).

The Petitioner sought rehearing *en banc*, which was denied without a single affirmative vote of any member of the Eleventh Circuit (App. 2).

This Petition followed.

SUMMARY OF ARGUMENT

Mandamus is a drastic and extraordinary remedy used only where there is a "usurpation of judicial power" or a clear abuse of discretion by a lower court; nothing of that kind occurred here. Mootness is a fact-based issue; there is no conflict in the decisions of the courts of appeals; the issue was previously adjudicated in 1988 and *certiorari* was denied from that mootness decision; and the ruling by the court of appeals was entirely correct.

ARGUMENT

MANDAMUS IS NEITHER NECESSARY NOR APPROPRIATE

This Court's decision in *Holywell Corp. v. Smith*, 503 U.S. 47 (1992), resolved an open question raised by the Liquidating Trustee in this adversary proceeding for a declaratory judgment: who, as between the Trustee and the debtor/Petitioners, should file tax returns and pay any taxes due?

This Court ruled in favor of the position asserted by the Solicitor General and the IRS. Thereafter, the Trustee and the IRS settled the matter. The Trustee paid the IRS approximately $13.3 million, and then claimed that amount and more from the Bank. The bankruptcy court held that the Bank was liable to the Trustee as an indemnitor and by virtue of the Trustee's reliance on the terms of the confirmed Plan under which he served. *Smith v. Bank of New York*, 161 B.R. 302 (Bankr. S.D. Fla. 1993). The Trustee and the Bank then settled those claims by reducing the indebtedness of the Trustee to the Bank. The bankruptcy court approved the settlement, and the district court affirmed when the Petitioner appealed.

There is nothing extraordinary in the events which occurred after this Court's ruling in 1992, or which warrants the drastic remedy of *mandamus*. To the contrary, all of the parties other than the Petitioners did what they were supposed to do – they used the guidance provided by this Court on the last major issue in these 13-year-old bankruptcies (the income tax issue) to settle the remaining claims so that the bankruptcies can be concluded before the Millennium.

And nothing in this Court's 1992 decision alters the implementation of the Plan or the issuance of the Trustee's Certificate, as held by all three courts below.

For their part, the bankruptcy and district court judges have complied in all respects with this Court's opinion in all the proceedings after remand.

Nothing here represents a "usurpation of judicial power" or disregard for this Court's ruling. *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383 (1953).

The only "usurpation" involved here is the Petitioner's abuse of the judicial systems by claiming again that "the bankruptcy court lacked the power to confirm the Bank's amended plan" (Petition, page 26), when this was decided adversely to the Petitioner over nine years ago. The Petition is merely further evidence of the Petitioner's unceasing refusal to accept prior, final, and adverse adjudications.

At page 18 of the Petition, note 32, Mr. Gould argues that the bankruptcy court overlooked an important statute in holding that certain claims by Gould were barred by Florida's statutes of limitation. But his citations have been superseded. "33 Fla. Jur. § 118" has been superseded by the second edition of "Florida Jurisprudence", and "Section 95.02, Florida Statutes" was repealed in 1974. It is error, pure and simple, to suggest that a beneficiary's claim against a trustee is not subject to any limitations period in Florida. The bankruptcy court's findings and statutory citations were correct.

The Petitioner's second claim, though hard to discern, seems to suggest a conflict in the courts of appeal

with respect to the mootness doctrine (Petition, pp. 27-28). There is no such conflict (and if there was, it would not be a timely argument by the Petitioner).

The question of whether equitable considerations warrant a dismissal on grounds of mootness, or whether "meaningful relief" can be granted upon review, is intensely fact-driven. This Court does not review such determinations.

There is no conflict as among the initial mootness decision by the court of appeals in these cases nine years ago – *Miami Center Ltd. Partnership, supra,* 838 F.2d 1547, *cert. den.,* 488 U.S. 823 (1988) – and *In re Chateaugay Corp.,* 10 F.3d 944 (2d Cir. 1993), or *Baker v. Drake, Inc.,* 35 F.3d 1348 (9th Cir. 1994). The cases are distinguishable on their facts, and not on their application of conflicting rules of law that need harmonization by this Court.

The essential facts pertaining to mootness in this case have been found and affirmed by three courts below – the bankruptcy court, district court, and court of appeals; in *Rodgers v. Lodge,* 458 U.S. 613, 623 (1982), this Court noted its reluctance to disturb findings of fact concurred in by two lower courts.

The Petition is frivolous and entirely improper; this Court has held squarely that, "the extraordinary writs cannot be used as substitutes for appeals"; *Bankers Life & Casualty Co. v. Holland,* 346 U.S. 379, 383 (1953), *citing Ex Parte Fahey,* 332 U.S. 258, 259-60 (1947), and the Petitioner has already pursued and lost such appeals.

This Court's Rule 20.1 notes that this Court's discretion to issue a writ of *mandamus* is "sparingly exercised".

The Rule requires the Petitioner to prove "exceptional circumstances", to demonstrate that the writ will be in aid of the Court's appellate jurisdiction, and to show that "adequate relief cannot be obtained in any other form or from any other court". The Petitioner has made no such showing.

CONCLUSION

For these reasons, the writ should be denied.

Respectfully submitted,

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